NO. 44487-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LARDELL COURTNEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's convictions for robbery and assault violate double jeopardy.

2. Appellant's convictions for robbery and assault involve the same criminal conduct for sentencing purposes.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of robbery and assault. The assault established the element of force for the robbery. Generally, in the absence of clear contrary legislative intent, convictions for robbery and assault merge under these circumstances and the assault conviction is vacated. Do appellant's convictions merge?

2. Appellant's crimes involve the same victim, same time and place, and same intent. Did the sentencing court err when it failed to find they constituted the "same criminal conduct" for purposes of appellant's offender score?

B. STATEMENT OF THE CASE

On the evening of September 6, 2012, Lardell Courtney entered a Tacoma Safeway and headed for the liquor aisle. RP 27, 35-37. Once there, he grabbed two bottles of alcohol and placed them inside his pants. RP 38-39. He then walked past the registers without making any effort to pay for the alcohol and exited the store.

RP 40-41.

Undercover security officer Nathaniel Duval-Igarta had been watching Courtney and followed him out of the store. RP 25-27, 40-41. As Courtney looked back, Duval pulled out his badge, identified himself as a security officer, and ordered Courtney to stop. Courtney ran away and Duval gave chase. RP 41-44. A second security officer, Axel Engelardt-Parales, assisted in the chase. RP 44, 78-79.

Duval was able to catch up with Courtney in the parking lot. Courtney looked over his left shoulder, saw Duval close behind, swung his right arm around, and unsuccessfully tried to strike Duval with his closed fist. RP 45-46. In response, Duval grabbed Courtney's jacket and pushed him forward, using Courtney's own momentum to bring him to the ground. RP 47-48. The two liquor bottles slipped out of Courtney's pants and landed on the asphalt. They did not break, however. RP 67-68, 70.

Duval then got on top of Courtney, but Courtney was able to momentarily escape his grasp by standing. RP 48-49. Engelhardt then wrapped his arms around Courtney from behind and threw him back to the ground. RP 79-80. Courtney continued to resist, squirming and attempting to hit both men and, at one point, striking Duval in the face. RP 49-51, 80-83. Duval was able to gain control,

however, and placed Courtney in restraints. RP 51, 82.

The Pierce County Prosecutor's Office charged Courtney with three crimes: (count 1) Robbery in the Second Degree, (count 2) Assault in the Third Degree (against Duval), and (count 3) Assault in the Third Degree (against Engelhardt). CP 5-7. A jury convicted Courtney on counts 1 and 2, but acquitted him on count 3. CP 10, 12-13. Jurors also entered a special verdict finding that Courtney committed his offenses shortly after being released from incarceration. CP 9.

At sentencing, Courtney argued his crimes involved the same criminal conduct and should be treated as a single offense for purposes of his offender score. RP 160-161. Although not directly addressing the issue, the court treated them as separate offenses and imposed an exceptional 96-month sentence for the robbery and a standard range 60-month sentence for the assault. CP 45, 49, 75-77. Courtney timely filed his Notice of Appeal. CP 61-74.

C. ARGUMENT

1. COURTNEY'S CONVICTIONS FOR ROBBERY AND ASSAULT VIOLATE DOUBLE JEOPARDY.[1]

"The double jeopardy clauses of the Fifth Amendment and article 1, § 9 of the Washington Constitution prohibit multiple punishments for the same offense." State v. Lynch, 93 Wn. App. 716, 723, 970 P.2d 769 (1999)(quoting State v. Hull, 83 Wn. App. 786, 792, 924 P.2d 375 (1996)). Although this is a constitutional protection, in deciding whether multiple punishments are allowed, the judicial inquiry is limited to one question: what did the legislature intend? State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

One test for legislative intent is the merger doctrine. "Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, [courts] presume the legislature intended to punish both offenses through a greater sentence for the greater crime" rather than two convictions. State v. Freeman, 153 Wn.2d 765, 772-773, 108 P.3d 753 (2005).

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[1] A double jeopardy claim may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

In Freeman, the Washington Supreme Court held that "[u]nder the merger rule, assault committed in furtherance of a robbery merges with robbery" in the absence of apparent contrary legislative intent. Freeman, 153 Wn.2d at 778 (citing 13 ROYCE A. FERGUSON, Jr., Washington Practice: Criminal Practice and Procedure § 4706, at 340-344 (3d ed. 2004)). Freeman involved first degree robbery and second degree assault, and the Supreme Court adopted a "a case by case approach" for determining whether the crimes are the same for double jeopardy, concluding that "[g]enerally, it appears these two crimes will merge unless they have an independent purpose or effect."[2] Freeman, 153 Wn.2d at 780.

Moreover, use of the merger doctrine is not limited to first degree robbery. It applies when an assault elevates a theft to a second degree robbery. In In re Butler, 24 Wn. App. 175, 177, 599 P.2d 1311 (1979), this Court held that second degree robbery and second degree assault also merge where the acts of force

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[2] The Freeman Court also examined whether *first* degree robbery and *first* degree assault merged, concluding they do not because of clear evidence the Legislature intended separate punishments for each. Freeman, 153 Wn.2d at 775-776, 778-780. There is no similar evidence for the crimes at issue in Courtney's case.

necessary to commit the robbery are the same acts of force constituting the assault. Butler's assault conviction was vacated. Butler, 24 Wn. App. at 178.

There is no reason a different rule should apply for second degree robbery and third degree assault. The acts of force Courtney used to commit the robbery were the same acts of force constituting the assault. There was no independent purpose or effect to the assault.

During closing argument, it appears the prosecutor attempted to avoid any double jeopardy violation by dividing the assaultive acts:

> The defendant does not need to inflict violence in order for this to be a robbery. He only needs to use or threaten to use force, and clearly that is what happened with that first swing when he missed Nathaniel Duval. That was clearly force or threat of force. . . . Defense counsel talked about the swing that was going on after they grabbed him. The robbery already took place at the time that Nathaniel Duval was swung at the first time. That swinging, when he first, when the defendant first swung at Mr. Duval that was robbery, because at that time the defendant still had the bottles of liquor on his person. Remember, it was when he was taken down to the ground that they slid across the ground without breaking, and that only happens if someone who's close to the ground – these are glass bottles. So clearly, at the time the defendant first swung at Nathaniel Duval, when the defendant still had the bottles on his person, that is robbery. Once those

> bottles slid out, slid away, the defendant no longer had the property. So any assault that took place later on is not part of a robbery. They're kind of – two different chunks of this.
>
> We had the robbery that occurred while the defendant still had the bottles, and then we had two assaults that occurred after the bottles skidded across the pavement.

RP 123-124.

There are at least two problems with this argument. First, the division between Courtney's use of force before the bottles slipped from his pants and after they slipped from his pants is an artificial one. Washington has adopted the transactional view of robbery, meaning the use of force can occur during the taking or thereafter to retain possession of the property. State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992). Under this view, the transaction is not complete "until the assailant has effected his escape." Id. at 290 (quoting State v. Manchester, 57 Wn. App. 765, 769, 790 P.2d 217, review denied, 115 Wn.2d 1019, 802 P.2d 126 (1999)); see also State v. Truong, 168 Wn. App. 529, 277 P.3d 74, 77 ("The taking is ongoing until the assailant has effected an escape."), review denied, 175 Wn.2d 1020, 290 P.3d 994 (2012). Because Courtney had not effected his escape when he assaulted Duval (while running or on the ground), all force was

part and parcel of the ongoing robbery.

Second, even if a robbery could be divided in the manner attempted by the prosecutor, merely arguing this theory to the jury would be insufficient to prevent a double jeopardy violation. The jury instructions did not limit jurors in any manner concerning the force used to commit robbery. Consistent with a transactional view of robbery, jurors could have used Courtney's attempt to hit Duval while the two were still upright or Courtney's struggle and/or successful punch to Duval's face while the two were on the ground to satisfy the force element. See CP 6-7 (no election in robbery instructions).

In order to defeat a double jeopardy claim, it must be manifestly apparent to jurors the State was not seeking to impose multiple punishments for the same act and manifestly apparent each conviction was based on a separate act. State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011). Where jury instructions permit a double jeopardy violation, this will be "a rare circumstance." Id. at 665; see also State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (election in closing insufficient to cure double jeopardy violation because jurors are told to rely on evidence and court's instructions rather than counsel's arguments).

Because Courtney's convictions for robbery and assault violate double jeopardy, his assault conviction must be vacated. See State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006) (usual remedy for double jeopardy violation is to vacate the offense carrying the lesser sentence), cert. denied, 551 U.S. 1137, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007).

2. COURTNEY'S CONVICTIONS ARE "THE SAME CRIMINAL CONDUCT" FOR PURPOSES OF HIS OFFENDER SCORE.

"[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the "same criminal conduct." RCW 9.94A.589 (1)(a).

"Same criminal conduct" means crimes that involve the same intent, were committed at the same time and place, and involved the same victim. Id. The test is an objective one that:

> takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective. Also relevant is whether one crime furthered the other.

State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). The issue is reviewed for an abuse of discretion or misapplication of the law, and the defendant bears the burden to show two crimes involve the same criminal conduct. State v. Graciano, 176 Wn.2d 531, 535-539, 295 P.3d 219 (2013).

Both the assault and the robbery involved the same victim – Duval. They also involved the same time and place. The State conceded this below, but argued the two crimes involved different intents. RP 162. In fact, they involved the same intent.

"The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). This includes whether the crimes were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996). Also relevant is whether one crime furthered the other. Graciano, 176 Wn.2d at 540; Burns, 114 Wn.2d at 318.

Here, both crimes were part of the same episode. Moreover, the assault most certainly furthered the robbery, as it was the means by which Courtney attempted to escape with the liquor. Indeed, the assaultive conduct was the force that elevated

what would have been a theft to a robbery. The State's contrary argument rested on its artificial distinction, discussed above in the context of double jeopardy, between the moment Courtney had the liquor in his pants and the moment it slipped out as he fell to the ground. RP 162 (prosecutor argues robbery "over and done with" when bottles fall to the ground). Because both crimes involved the same criminal intent – an intent to escape with stolen merchandise – the assault and robbery should have been treated as a single crime for purposes of Courtney's offender score.

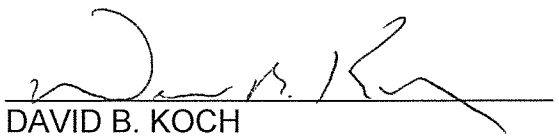
D. CONCLUSION

Courtney's convictions violate double jeopardy. The assault conviction and sentence should be vacated. If the assault conviction is not vacated, Courtney's offender score should be corrected because his two convictions involve the "same criminal conduct" for purposes of sentencing.

DATED this 18th day of June, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Re: Lardell Courtney Cause No. 44487-9-II, in the Court of Appeals, Division II, I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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